

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION**

Bond Dickinson

Steering Group Meeting: 16 October 2017

NOTING PAPER: UPDATE ON LITIGATION STRATEGY

1. SUMMARY

- 1.1 This Paper provides an update on the current state of play in relation to the CMC scheduled for 19 October 2017. Background information on the CMC process and the terminology used below can be found in our Litigation Strategy Paper dated 11 September 2017 (**the Strategy Paper**).
- 1.2 We are still recommending the strategy set out in the Strategy Paper which is to focus on the contractual issues, with supplemental orders in relation to striking out weak claims and attacking the claim valuation.
- 1.3 Freeths have made a number of concessions recently that have brought their proposals closer to Post Office's position. A comparison document showing the Orders currently sought by each party is attached. There are however still some major points of dispute, the greatest of which is in relation to the disclosure of documents. Freeths are still seeking a massive number of documents from Post Office, at an estimated cost of £2m - £6m, whereas our proposal is to offer much more targeted disclosure of documents.
- 1.4 This noting paper is accompanied by two related decision papers:
 - 1.4.1 Should Post Office restrict the Preliminary Issues to only the 1994 Subpostmaster Contract?
 - 1.4.2 Should Post Office agree to extend the cut-off date for new Claimants?

2. UPDATE SINCE THE LAST PLSG MEETING

- 2.1 We have filed with the Court a draft Order in line with the Strategy Paper and a Skeleton Argument that sets out the reasons for that draft Order. This was supported by a witness statement setting out detailed information on why Freeths' requests for disclosure are unreasonable.
- 2.2 Freeths have also submitted a draft Order and Skeleton Argument, but did not submit a witness statement (nor were they required to). Their draft Order was significantly different from the draft Order they had previously proposed, with it now being more closely aligned with Post Office's position and Freeths having accepted that there should be a focus on the contractual issues before dealing with other subjects (eg. Horizon).
- 2.3 The general thrust of Freeths' position is that Post Office is an unreasonable and obstructive organisation that has treated postmasters badly and is now, in a similar vein, obstructing the Court process. They also say that there is a significant imbalance of information between the parties, with Post Office holding all the salient information. From this premise, they demand that, before the contractual issues are addressed, Post Office discloses a huge number of documents in an exercise that we believe would cost between £2m - £6m and take around 12 months.
- 2.4 Freeths have also formally discontinued the claims of 12 Claimants. No reasons were given for this.
- 2.5 Having reviewed Freeths' draft Order, there are a number of minor points that we believe Post Office should accept so as to limit the scope of disputes at the CMC. We have invited Freeths, on a number of occasions, to meet to discuss draft Directions to see if it is possible to reach an agreement. They have so far not taken up that offer. We therefore intend to provide Freeths with

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a revised draft Order in writing before the CMC. We also intend to submit a further short witness statement dealing with the cut-off date issue described below.

- 2.6 The key points of dispute that will likely be discussed at the CMC on Thursday are described in section 3 below. In essence the Court has a choice between two competing positions:
- 2.6.1 Freeths want a **wide** disclosure of documents followed by a trial dealing with a **narrower** range of contractual points based on the cases of a **small** number (6) of Lead Claimants. This would likely result in a trial in late 2019 / early 2020 at a cost to Post Office of around £4m - £9m.
- 2.6.2 Post Office wants a more **limited** disclosure exercise followed by a trial dealing with a slightly **wider** range of contractual points based on a **larger** number (12) of Lead Claimants. This would likely result in a trial in late 2018 / early 2019 at a cost to Post Office of around £2m - £3m. In parallel, Post Office also wishes to explore the possibility of striking out weak claims.
- 2.7 Please note that the above is a gross simplification of the number and complexity of issues that the Court will need to deal with. Moreover, the Court is not limited to the binary outcomes above and may direct any course of action it wishes.
- 2.8 We should receive an immediate decision from the Court on the day of the CMC. However, there is a material risk that we may run out of time on Thursday, in which case we will be adjourned until the next available hearing date which may take several weeks.

3. POINTS OF DISPUTE

Preliminary Issues

- 3.1 The Claimants broadly agree that the Court should first address a series of Preliminary Issues focused on Post Office's standard contracts. The major modification they seek is that this inquiry should only cover the 1994 SPMR Contract and exclude consideration of the NT Contracts.
- 3.2 Freeths have confirmed that the reason for excluding the NT Contracts is because the number of Claimants who are/were engaged on a NT Contract is small (approx. 30). On our analysis, there appear to be approx. 100 Claimants who are/were engaged on a NT Contract.
- 3.3 It is a finely balanced question on whether to push to include the NT Contracts. On balance the legal team's view is that the NT contracts should be included but as this has commercial consequences for Post Office we have set out this issue in a separate decision paper for further consideration.

Lead Claimants

- 3.4 Post Office's proposal was that 40 Lead Claimants are selected for the purposes of disclosure and this is reduced to 20 Lead Claimants who produce pleadings for use at Preliminary Issues trial. The Claimants have reduced the pool of Claimants to 10 for disclosure purposes and then to 6 for pleadings.
- 3.5 The number of Lead Claimants needed will depend on whether NT Contracts are included within the Preliminary Issues as we will need more Lead Claimants if NT Contracts are included. We suspect a compromise of around 30 cases for disclosure with 8-10 cases for trial should be attractive to the Court.

Disclosure

- 3.6 The Claimants continue to push for massive amounts of disclosure from Post Office whilst providing none themselves. Indeed, they are insisting on full disclosure of the Known Error Log

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despite our offer to allow them to inspect it at Fujitsu. We will be pushing back on this point and this can be expected to be the main point of discussion at the CMC.

- 3.7 More information on this can be found at paragraph 50 to 141 of the Fourth Witness Statement of Andrew Parsons (copy enclosed).

Cut-off date

- 3.8 Freeths have requested that the cut-off date for adding Claimants to the Group Action is extended to December 2017. They have already identified a further 47 Claimants who wish to join the Group Litigation. Please see the separate decision paper for more information on this matter.

Provision of further information

- 3.9 The Claimants have objected to all our requests for further information on limitation, settlement, false accounting and quantum. The first three topics are areas where we may be able to strike out Claimants.
- 3.10 We will be pushing at the CMC for this information to be provided with the caveat that we may wish to concede on false accounting since this is the most difficult to justify. However, for tactical reasons we want to keep it alive for now since: (1) it allows Counsel to tell the Judge about false accounting thus prejudicing the Claimants and (2) if Freeths do decide to meet with us, this will be a good bargaining chip as we believe that they will want to resist any Order that forces them to admit that Claimants have been falsely accounting to Post Office.

Conspiracy, human rights and misfeasance

- 3.11 The Claimants have refused to amend the Claim Forms to remove the un-pleaded claims for conspiracy, human rights and misfeasance in a public office. We are keen to remove these claims because:
- 3.11.1 We want to remove the wider risk to Post Office of there being judgment that says that Post Office is subject to public law claims of misfeasance and human rights breaches.
- 3.11.2 As these claims are not pleaded, Freeths' position is not pinned down in writing. There is a therefore risk that Freeths will modify these claims to fit the circumstances as the litigation progresses.
- 3.12 Although we recommend fighting these points at the CMC, Counsel may give ground here depending on the mood of the judge.

Costs

- 3.13 Costs of all historic applications (our application on time-barred amendments and their application for an extension of time) are agreed as costs in the case. The Claimants are however refusing to pay Post Office's costs in relation to 12 Claimants which have discontinued their claims. We will be contesting this point at the CMC. Whilst the sums involved are not significant (approx. £3,800 per Claimant) the principle which this sets going forward will be important.

The Claimants have also asked for liberty to apply at a later date for a Costs Management Order. CMOs are used to control litigation costs. No explanation has been provided for why this Order is being sought but we anticipate that this might be the start of a plan by Freeths to try to cap the recovery of Post Office's costs from the Claimants.

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4. MEDIA ATTENDANCE AT THE CMC

- 4.1 Freeths have informed us that a journalist will be attending the CMC hearing. Bond Dickinson have discussed this matter with Rodric Williams and Mel Corfield and advised that any attempts to block attendance by journalists would not only be unlikely to succeed but would also be seen as preventing open justice and playing into the Claimants' story that Post Office are oppressive.
- 4.2 Bond Dickinson have informed Freeths that Post Office would not object to journalists attending the CMC hearing and have brought this to Counsels' attention.

5. STATEMENT OF COSTS

- 5.1 Both parties were required to file with the Court a statement which sets out their costs incurred to date and the projected estimate of costs to the conclusion of the CMC.
 - 5.1.1 Post Office's costs: £2,053,488.59.
 - 5.1.2 The Claimants' costs: £4,180,803.35.
- 5.2 Although the Claimants' costs are double Post Office's, the figures are not far apart when compared on a like for like basis.
- 5.3 Freeths have charged £3.5m. Bond Dickinson has charged around £800k. However, Freeths have had to undertake the additional work of preparing the Schedules of Information which Post Office did not need to do and on which they spent £1m. Additionally, Freeths hourly rates are approximately double Bond Dickinson's hourly rates. If the time spent on SOIs is removed and an adjustment made for different hourly rates, the time spent working on this matter by Freeths is similar to the time spent by Bond Dickinson.
- 5.4 The Claimants' disbursements are £700k. Post Office's disbursements are £1.2 million of which approximately £500k is Deloitte's fees. If Deloitte's fees are removed, so the parties' figures can be compared on a like for like basis, then both sides have spent similar money on disbursements. These disbursements principally relate to Counsel's fees.